IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

AT&T WIRELESS SERVICES INC.,	)	
	)	
	)	
Plaintiff,	)	C.A. No. 03C-12-232 WCC
	)	
v.	)	
	)	
FEDERAL INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., ST. PAUL MERCURY INSURANCE COMPANY, AND CERTAIN UNDERWRITERS OF LLOYD'S LONDON, AND CERTAIN LONDON MARKET COMPANIES,	)	
	)	
Defendants.	)	

Submitted: September 6, 2006
Decided: January 30, 2007

ORDER

Upon Plaintiff's Motion for Reargument - DENIED.

CARPENTER, J.

The Court presently has before it a Motion for Reargument filed by AT&T Wireless (AWS) relating to the Court's decision of January 31, 2006.[1] After receiving additional submissions from the parties, the Court finds that its decision regarding the obligation of National Union was made on what now appears to be a definition of "Securities Action Claim" that the parties agree was incorrect. Based upon these representations, that aspect of the decision will be modified, but as explained below, it does not change the ultimate outcome of the Court's prior decision. In addition, as to the other arguments made by the Plaintiff in its Motion for Reargument, the Court finds its previous decisions to be reasonable and appropriate. The Court has not misconstrued or misinterpreted the law or the facts applicable to the case, and therefore, the Motion for Reargument will be denied.[2]

As indicated in the January 31, 2006 opinion, the National Union policy provided for twenty-five million dollars of excess coverage and allowed for three possible areas of coverage under the policy:

> (A) Underwriters shall pay on behalf of the Directors and Officers Loss resulting from any Claim first made against the Directors and Officers during the Policy Period for a Wrongful Act.

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[1] Complete factual or procedural background is set forth within the Court's prior opinion. *AT&T Wireless Serv. v. Fed. Ins. Co.*, 2006 WL 267135 (Del. Super. Ct.).

[2] *Bd. of Managers of the Del. Crim. Justice Info Sys. v. Gannett Co.*, 2003 WL 1579170 (Del. Super. Ct.); *aff'd in part*, 840 A.2d 1232 (Del. 2003); see also *Gass v. Truax*, 2002 WL 1426537 (Del. Super. Ct.)(citations omitted).

(B) Underwriters shall pay on behalf of the Company Loss which the Company is required or permitted to pay as indemnification to any of the Directors and Officers resulting from any Claim first made against the Directors and Officers during the Policy Period for a Wrongful Act.

(C) Underwriters shall pay on behalf of the Company Loss resulting from any Securities Action Claim first made against the Company during the Policy Period for a Wrongful Act.[3]

The only relevant provision to the present motion is Subsection (C) above, which would provide for coverage when the company is involved in a securities action claim. The contract executed regarding National Union's policy obligation defined Securities Action Claim as follows:

> Securities Action Claim means any formal investigatory proceeding before the Securities and Exchange Commission or any similar federal, state or local governmental body with jurisdiction over any violation of the Securities Act of 1933, the Securities Exchange Act of 1934, rules or regulations of the Securities Exchange Commission under either or both Acts, similar securities laws or regulations of any state, or any common law relating to any transaction arising out of, involving, or relating to the purchase or sale of or offer to purchase or sell any securities whether on the open market or through a public or private offering.[4]

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[3] Compl. Ex. D. at 15 (Policy #509/QB405301).

[4] *Id*. at 19.

Since it appeared to the Court that this definition was the one in force at the time the Chancery Court litigation that forms the basis of this action was instituted, it was deemed controlling and was used in making the earlier decision. As it is clear that the Chancery Court action would not fit within this definition, the Court found no basis to support coverage under Subsection (C) in the January 31, 2006 opinion. At least for the purposes of this Motion, the parties agree this assumption by the Court was incorrect.

It appears that the National Union policy and its related Lloyds policy were purchased by the Plaintiff before it was spun off from its parent company, AT&T Corporation. Mr. Craig Bartol was responsible for negotiating the insurance policies, and it was his intention and his belief that these policies would provide coverage consistent with the coverage that had been previously provided to AWS through their parent company. Mr. Bartol's affidavit[5] reflects that the intended definition of Securities Action Claim which would have been consistent with that previously negotiated by the parent company would include the following:

> "Securities Action Claim" means any judicial or administrative proceeding initiated against any of the Directors and Officers or the Company based upon, arising out of, or in any way involving the Securities Act of 1933, the Securities Exchange Act of 1934, rules or regulations

[5] Pl. Resp., Ex. A.

> of the Securities Exchange Commission under either or both Acts, similar securities laws or regulations of any state, or any common law relating to any transaction arising out of, involving, or relating to the sale of securities which they may be subjected to a binding adjudication of liability for damages or other relief, including any appeal therefrom.[6]

It is this definition that the parties assert should be considered correct. When this definition is applied to the coverage set forth in Subsection (C) of the policy stated above, it appears to undermine the previous finding of the Court regarding whether there was coverage directly to the company as a separate entity. There is no dispute that AWS was a named defendant in the Chancery Court action in a separate and distinct count of the complaint. Count II of the Second Amended Complaint filed in the Chancery Court states as follows:

Count II
(Against Defendant AT&T Wireless for Aiding and Abetting)

> 185. Plaintiffs repeat and reallege each of the foregoing paragraphs as if fully set forth herein.
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> 186. By creating and/or exploiting the conflicts of interest affecting TeleCorp's directors, as described above, and by conspiring with the Director Defendants to (a) cause the TeleCorp Board's approval of the Merger by a process and at a price that lacks entire fairness, (b) divert excessive merger consideration to the holders of the Series E and Series C Preferred Stock and to TMC, and (c) obtain the

[6] Bartol Decl., Ex. 1.

> stockholder votes necessary to approve the Merger in exchange for personal benefits, AT&T Wireless knowingly and actively participated in the reaches of the fiduciary duties of care, loyalty and good faith owed by the Director Defendants to TeleCorp's stockholders.[7]

While on the surface it would seem that since AWS was named as a separate defendant, this would end the dispute and allow for coverage. Unfortunately, like most matters in this litigation, things are not that simplistic.

National Union argues that since the aiding and abetting conduct asserted by the Plaintiffs in the Chancery Court action flowed from, originated in and involved the actions of a Telecorp board which included three AWS officers approving the alleged unfair merger, that Exclusion K of the policy would prevent coverage.

Exclusion K states that the underwriters shall not be liable to make any payment in connection with any claim:

> K. based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving the Directors and Officers service for any entity other than the Company except:
>
> 1. where such Directors and Officers serve as directors or officers of any not-for-profit or charitable organisation or Political Action Committee and such service is at the knowledge, request and consent of the Company;

[7] Second Am. Compl., *In re Telecorp PCS, Inc., Shareholders Litig.* (Del. Ch. C.A. No. 19260).

2. whilst an employee of the Company serves as a director or officer of the Joint Venture between the Parent Company and British Telecommunications Plc until such time that the Joint Venture purchases a stand-alone Directors' and Officers' Liability Policy.[8]

In support of this position, National Union cites to the Court's earlier opinion where the Court found no separate and independent contractual provision that allowed recovery by AWS unrelated to the conduct of its officers. However, the underpinning of this statement by the Court was the applicability of the incorrect definition of Securities Action Claim as set forth above. Under the new definition, there is coverage under Subsection (C) of the coverage provisions of the National Union policy. The question now is whether the conduct alleged in the Chancery Court action against AWS can be said to be based upon, arising out of, directly or indirectly resulting from, or in consequence of or in any way involving AWS directors and officers' service to Telecorp. Given the breadth of this exclusion, the Court feels bound to answer yes.

When one cuts to the core of the conduct by AWS in the Chancery Court action, it reveals a masterful manipulation and a compromising of the conduct of the officers and the board of directors of Telecorp in order to obtain control of that

[8] Compl. Ex. D. at 6, 21 (Policy #509/QB405301).

corporation. This was accomplished through the AWS officers who were placed on the Telecorp board and who provided the necessary votes to approve the merger. The underlying Chancery Court action certainly was the consequence of, or at a minimum, indirectly resulted from, the conduct of these officers, and thus Exclusion K becomes applicable. This is simply not a case where the conduct of AWS can be separated and distinguished from these officers.

As a result of the above, the Court reaffirms its prior decisions concerning the obligation of National Union under the policies executed with AWS and the ultimate conclusions reached by the Court in its January 31, 2006 decision are unchanged. Accordingly, Plaintiff's Motion for Reargument is DENIED.

IT IS SO ORDERED this 30th day of January, 2007.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.